9-1700-10594-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

David Anderson and Kuo Chang

Complainants,

v.

Alliant Techsystems, Inc., a Delaware Corporation,

Respondent.

ORDER ON MOTIONS FOR SUMMARY DISPOSITION

The above-entitled matter came on before Administrative Law Judge Phyllis A. Reha pursuant to Respondent's motion for summary disposition on Complainants' claims and Complainant Chang's motion for partial summary disposition on his disparate impact claim. Oral argument was heard on May 21, 1999 and the record closed on July 7, 1999 upon receipt of the parties' memoranda and correspondence.

Malcom P. Terry, Esq., Barna, Guzy & Steffen, LTD., 400 Northtown Financial Plaza, 200 Coon Rapids Boulevard, Coon Rapids, Minnesota 55433, appeared on behalf of Kuo Chang ("Chang" or "Complainant").

Donald E. Horton, Esq., Spruce Tree Centre, Suite 9, 1600 University Avenue West, St. Paul, Minnesota 55104, appeared on behalf of David Anderson ("Anderson" or "Complainant").

Roy A. Ginsburg, Esq., and Clifford Anderson, Esq., Dorsey & Whitney, LLP, 220 South Sixth Street, Minneapolis, Minnesota 55402-1498, appeared on behalf of Alliant Techsystems, Inc. ("Alliant" or "Respondent").

Based upon all of the file, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. That Respondent's motion for summary disposition on Complainants' disparate treatment claims is DENIED.
2. That Respondent's motion on Complainants' disparate impact claims is GRANTED.
3. That Complainant Chang's motion for partial summary disposition on his disparate impact claim is DENIED.

Dated this ___ day of July, 1999.

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PHYLLIS A. REHA
Administrative Law Judge

MEMORANDUM

Background

Kuo Chang and David Anderson have brought age discrimination claims pursuant to the Minnesota Human Rights Act[1] against their former employer Alliant Techsystems, Inc. ("Alliant"). Both Chang and Anderson were long term Honeywell employees prior to Honeywell's spin off of its defense-related business to Alliant in 1990. After the spin-off, both Chang and Anderson worked for Alliant. Chang was 54 years old and a Senior Product Support Engineer when he was laid off from Alliant in April of 1995. Anderson was 56 years old and a Senior Material Analyst in Alliant's Material Management Program when he was laid off in January of 1995. In challenging their terminations, Complainants have alleged both disparate treatment and disparate impact claims. Alliant has brought a motion for summary disposition on Complainants' claims and Chang has brought a motion for partial summary disposition on his disparate impact claim.

Alliant designs, manufactures and sells defense related products and services. Due to decreased defense spending and a reduction in military contract work in the late 1980s and early 1990s, Alliant carried out a series of workforce reductions beginning in 1990 and continuing into 1997. These reductions in Alliant's workforce (RIFs) were accomplished through voluntary retirements, attrition, and involuntary layoffs. The downsizing resulted in a 62% reduction of Alliant's salaried workforce in a five-year period. Alliant went from 3,558 salaried employees in 1990 to 1,350 in 1995.[2] And, in the same five-year period, Alliant's revenue dropped by approximately $458 million.

To implement the RIFs, Alliant developed a ranking process with specific criteria for supervisors and managers to use to evaluate and identify possible candidates for layoff. Between 1990 and 1995, the specific ranking criteria used to identify employees for layoff changed. For example, prior to Alliant's spin-off from Honeywell, "seniority" was considered a "critical factor" in employee ranking for the purposes of workforce reductions.[3] After Alliant was formed, seniority and longevity of service were eliminated except for the occasional use as tiebreakers.[4] In addition, after 1990 Alliant employed a "snapshot" approach to employee evaluations. That is, supervisors would look only at an employee's performance since his or her last review, instead of applying a historical perspective.[5] And employees were sometimes reviewed more than once in a one-year period.

The ranking criteria in effect at the time of Complainants' layoffs were: (1) demonstrated job skills in current assignment; (2) demonstrated job skills in attaining Alliant performance standards; (3) demonstrated job skills in related work assignments areas; (4) demonstrated work conduct; and (5) demonstrated leadership behaviors.[6] Once a department manager was notified that reductions were required, the manager would determine which job families and/or job titles would be the focus of layoff recommendations. Generally, employees compared for layoff selection were from the same job family and/or job title.[7]

Complainants maintain that the workforce reductions targeted and adversely affected older employees. Alliant argues that its decisions regarding which employees to retain and which to let go were made in a legitimate and non-discriminatory manner based on a fair employee evaluation and ranking system. According to Alliant, age was never a criterion in the selection of any employee for layoff.

Chang's Employment History

Kuo Chang was born May 27, 1941. Chang began working for Honeywell in 1978 as a Plastics Engineer. By June 1986, Chang was working in Tank Ammunition Systems and his job title was Senior Development Engineer. In 1987, Chang became a Principal Product Engineer. And in August 1992, Chang's job title changed again to Material, Evaluation, Product, and Subcontract Engineer ("Product Support Engineer"). Chang remained in his position as a Product Support Engineer until his layoff on April 10, 1995. Throughout his career, Chang functioned primarily as a trouble-shooter, solving engineering problems that typically arose during the initial production phases of tank ammunition production. Chang was 54 years old at the time of his lay off.

Until 1994, Chang was consistently ranked at or near the top of the engineering job family within Tank Ammunition Systems. For example, on May 13, 1991, Chang was ranked number 3 out of 37 employees against whom he was compared.[8] On February 5, 1993, Chang was ranked number 1 out of 38 employees.[9] On May 26, 1993, Chang was again ranked number 1 out of 35 employees.[10] In 1993, Randy Schiestl became Manager of Tank Ammunition Systems and William Noon became Chang's immediate supervisor. In Chang's next ranking, on November 9, 1994, Noon and Schiestl ranked Chang the lowest among three other grade 24 engineers.[11] All three engineers in this ranking were older than age 50 at the time of the ranking. By January 1995, Chang's overall department ranking was 22 out of 23 engineers.[12] And in February 1995, Chang was selected for layoff.[13] Chang argues that his sudden and significant drop in rank suggests that the ranking system was manipulated to mask discriminatory motives.

Alliant maintains that while Chang was an excellent trouble-shooter, he was not very good at accomplishing the day-to-day tasks of a product support engineer. According to Alliant, as work decreased and Chang's troubleshooting skills were in less demand, Chang's work shifted to more mundane production support tasks. And this shift in work coincides with Chang's sudden significant drop in ranking. In deposition testimony, however, Schiestl and Noon were unable to give specific examples of Chang's poor work performance beyond stating, as provided in Alliant's Third Amended Answers to Interrogatories, that Chang failed to attend scheduled meetings and wrote poor task releases.[14] In fact, Schiestl conceded in his deposition that prior to reading the interrogatory response he was unaware of any examples of poor performance by Chang.[15] Moreover, in evaluating Chang, neither Noon nor Schiestl contacted former supervisors, customers or vendors to gather information regarding Chang's performance.[16] And Chang's trouble-shooting efforts on the engineering proposal known as "Project Phoenix" were given little, if any, consideration in his November 1994 performance review.[17]

Anderson's Employment History

David Anderson was born September 4, 1938. Anderson began working for Honeywell in a shipping and packing position shortly after he graduated from high school in

1956. Beginning in 1970, Anderson began working a series of jobs involving Honeywell's production of torpedoes. His job duties primarily involved inventory control responsibilities. Anderson performed inventory control work on both the Mk 46 and the MK 50 torpedo programs at the time Alliant was created in September 1990. By 1995, Anderson held the position of Senior Material Analyst in Alliant's Materials Management Organization. Anderson was 56 years old at the time Alliant terminated his employment in early 1995.

Anderson contends that he was a well-qualified employee who conducted training sessions for other Material Management employees and was one of only a few employees who was certified by American Production and Inventory Control Society (APICS) in production and inventory management. Anderson maintains that his generally positive prior performance evaluations cannot be reconciled with his sudden low ranking in December 1994. Anderson points out that just two months before his low December 1994 ranking, he was part of a team of employees who received an "Above and Beyond Contribution Award" for outstanding performance.[18]

With respect to his rankings, Anderson was tied for 13th with three other employees out of a total of 39 employees on January 29, 1992.[19] Anderson placed 17th out of 40 employees in January 1993.[20] And in March 1994, Anderson was tied for seventh out of 19 employees.[21] Months later, in December 1994, Anderson dropped 10 points and was ranked last among 17 employees.[22] The three managers who ranked Anderson in December 1994 had worked with him for only a few months. Of the three, Nancy Dornfield was Anderson's supervisor from April 1994 until late summer 1994. Lee Biersdorf was Anderson's supervisor from late summer 1994 through December 1994. And Rolf Jostad never supervised Anderson. Both Dornfield and Biersdorf's offices were located in New Brighton and Anderson's was located in Hopkins.

Alliant contends that managers regarded Anderson as "passive and lacking the assertiveness and proactivity his job required."[23] Yet, in their depositions, neither Beirsdorf nor Dornfield could recall specific examples of Anderson's lack of assertiveness or poor work performance that justified his low ranking.[24] Moreover, in his 1994 performance and peer evaluations, Anderson was praised specifically for his proactiveness, assertiveness, follow-through and extraordinary efforts at work.[25] And, Tim Gustafson and Bob Foss, two managers with direct knowledge of Anderson's work, had no input into Anderson's December 1994 ranking.[26]

Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[27] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.[28] A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.[29]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.[30] A nonmoving party cannot rely on pleadings alone to defeat a

summary judgment motion.[31] The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.[32] The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.[33]

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.[34] All doubts and factual inferences must be resolved against the moving party.[35] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[36] In employment discrimination cases, summary judgment should only be used sparingly.[37] And summary judgment should only be granted in those instances where there is no dispute of fact and where there exists only one conclusion.[38]

I. Disparate Treatment

Direct Evidence

A party claiming disparate treatment age discrimination may rely either on direct or indirect evidence to demonstrate that his employer discriminated against him based on age. When a plaintiff alleges direct evidence of discriminatory intent, it is not necessary to use the McDonnell Douglas burden shifting analysis.[39] Direct evidence is "evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the fact finder to infer that that attitude was more likely than not a motivating factor in the employer's decision."[40] Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action to support such an inference.[41] For example, "stray remarks in the workplace", "statements by nondecisionmakers", or "statements by decisionmakers unrelated to the decisional process itself" cannot serve as direct evidence of discrimination.[42]

Here, Complainants contend that they have presented direct evidence of age discrimination. Specifically, Complainants cite: (1) a comment allegedly made by CEO Toby Warson in 1990 regarding "targeting older employees" for layoffs in order to reduce costs[43]; (2) the 1995 "Schwartz Memo" summarizing an upper management brainstorming meeting and listing among the ideas expressed the recommendation that Alliant "hire some new people – additional talent – Younger talent that can be trained."[44]; (3) the 1994 "White Paper" drafted by Alver Abrahamson, an employee of Alliant's Human Resources department, which analyzes voluntary early retirement incentives and contains the statement: "Targets older, possibly higher paid employees."[45]; (4) Alliant's "Succession Management Plan" which identified "high talent" employees for promotion and other employment opportunities and contains the statement: "good retention of executive and younger talent"[46]; and (5) Alliant's internal Human Resources' studies identifying adverse age impact in the layoffs.[47]

The Administrative Law Judge finds that none of the statements or documents listed above is *direct* evidence of unlawful age discrimination. Complainants have been unable to establish that any of the identified statements were made by persons involved in the decisionmaking processes that lead to their specific terminations. Although Chang claims that it was his manager, Randy Schiestl, who made the "hire new … younger talent" suggestion recorded in the Schwartz Memo, the Judge finds Chang's evidence supporting this claim to be insufficient. Specifically, Chang has submitted an affidavit of Peter Iverson, the Manager of Industrial Relations and a Human Resources Representative at Alliant from May, 1990 to May,

1995.[48] While Iverson states in his affidavit that at the May 1995 managers' meeting the suggestion to hire new, younger talent was "proclaimed as the company policy by management, including Randy Schiestl …"[49], Iverson does not specifically identify Schiestl as the one who made the suggestion. Moreover, the Schwartz Memo in which this suggestion appears, concerns a management meeting that occurred months *after* Chang and Anderson were terminated. Consequently, even if Chang could establish that it was Schiestl who suggested hiring younger talent, the suggestion would not be direct evidence because it would be a statement made by a decisionmaker "unrelated to the decisional process itself." Therefore, while these comments or documents may reflect a discriminatory attitude at Alliant, they are not sufficiently related to Complainants' terminations to support an inference that age was a motivating factor in their selection for layoff.

McDonnell Douglas Burden Shifting

Under the Minnesota Human Rights Act, if a party presents no direct evidence of age discrimination, the McDonnell Douglas burden shifting analysis is applied.[50] Under McDonnell Douglas, the complainant must first establish a prima facie case of discrimination. In reduction in force cases ("RIFs"), a complainant establishes a prima facie case by demonstrating that: (1) he is within a protected age group; (2) he met applicable job qualifications; (3) despite these qualifications, he was discharged; and (4) additional evidence exists that age was a factor in his termination.[51] If the Complainant carries his initial burden of production, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[52] The burden then shifts back to the Complainant to show that the reason offered by the employer was pretextual.[53]

Genuine RIFs

As an initial matter, Complainants dispute Alliant's assertion that the RIFs were a business necessity caused by cuts in defense spending. According to Complainants, the "cuts in defense spending had no effect on Alliant, the products it manufacturers (sic), or defense related employment" as it relates to the manufacture and sale of munitions.[54] Complainants argue that the cuts in defense spending predominantly resulted in base closures and reductions in service personnel - not in decreases in munitions manufacturing. In fact, Complainants contend that sales of some Alliant munitions actually increased in the 1990-95 time frame.[55] Complainants base this claim on the affidavit of former Honeywell executive Robert Mockenhaupt, who states generally that defense spending for certain military products increased.[56] Mr. Mockenhaupt was the Vice President of the former Defense Systems Group of Honeywell.[57] He retired in 1990, prior to the formation of Alliant.[58] According to Mr. Mockenhaupt, while the overall United States' defense budget declined, certain budget items such as ordnance procurement saw "selected increases" due to the need to replenish stockpiles consumed in combat and training exercises.[59] Mr. Mockenhaupt does not state, however, whether the sale of specific Alliant products increased during the 1990-1995 time frame and, if so, by how much. In addition to Mockenhaupt's statements, Complainants point to Alliant's positive 1994 financial statements and to the "golden parachutes" and stock options worth millions of dollars it paid departing executives in 1994 as further evidence that Alliant was financially healthy and that the 1990-1995 RIFs were a "sham".

Alliant maintains that the RIFs that took place during 1990-1995 were legitimate, bona fide and necessitated by real financial pressures brought on by the dramatic

downturn in the defense industry. Alliant submits the undisputed fact that it underwent a 62% reduction of its salaried workforce between 1990 and 1995 – a decline in workforce from 3,558 Minnesota salaried employees in 1990 to 1,350 by the end of 1995.[60] And, between 1990 and 1995, only 122 workers were hired into 76 different job titles. Thus, over two thousand Alliant employees, who were either laid off or left, were not replaced.[61] Moreover, Alliant's revenue dropped $458 million between 1990 and 1995.[62] And, Alliant argues that the fact that it had to honor employment agreements by paying bonuses and stock options to departing executives does not in any way evidence that its reductions in force were a "sham".

The Minnesota Supreme Court in *Dietrich v. Canadian Pacific Ltd.*[63], adopted the following standard articulated by the Sixth Circuit to determine whether a genuine reduction-in-force has occurred:

> [a] work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another person is hired or reassigned to perform the plaintiff's duties.[64]

After reviewing the submissions of the parties, the Administrative Law Judge concludes that the RIFs that took place at Alliant between 1990-1995 were legitimate and necessitated by real financial pressures. Complainants' arguments to the contrary are conclusory and unsupported by evidence in the record. General statements by former Honeywell executive Mockenhaupt regarding munitions production and 1994 financial statements are insufficient to support Complainants' claim that Alliant's reductions in force were a "sham". Consequently, as Complainants' terminations took place in a genuine RIF context, Complainants must put forth "additional evidence" that age was a factor in their terminations in order to establish a prima facie case.[65]

Prima Facie Case

Both Chang and Anderson maintain that they have established prima facie cases of disparate treatment. Complainants argue that they are members of a protected class, they were well qualified for their positions, they were discharged, and both claim that additional evidence exists that age was a factor in their terminations. Alliant concedes that Complainants have met the first three elements of a prima facie case. Alliant disputes, however, that Complainants have put forth sufficient "additional evidence" to satisfy the fourth element. Complainants have submitted the following as "additional evidence" that age was a factor in their terminations: (1) an age-biased culture at Alliant reflected in CEO Toby Warson's alleged comment in 1990 regarding "targeting older employees" for layoffs, the "Schwartz Memo", the "Succession Management Plan", the "White Paper", and Alliant's internal Human Resources analyses of the layoffs indicating an adverse age impact; (2) the changing employee ranking criteria which increasingly disadvantaged older, long-term employees; (3) Complainants' sudden drop in rank suggesting the ranking process was manipulated to mask discriminatory motives; and (4) Complainants' statistical evidence demonstrating that employees over 40 years old were laid off in disproportionately greater numbers during the RIFs. According to Complainants, all

of this evidence creates a fact issue as to whether Alliant's proffered reasons are pretextual and creates a reasonable inference that age was a determinative factor in their termination.

In construing the Minnesota Human Rights Act, the Minnesota appellate courts often look to similar federal legislation and case law such as Title VII of the federal Civil Rights Act, and the Age Discrimination in Employment Act (ADEA).[66] Although federal precedent is not controlling, it is instructive. Recently, the Eighth Circuit clarified that the "additional evidence" requirement for RIF cases, is merely part of the establishment of a prima facie case and is not intended to be overly rigid or a significant hurdle for an employment-discrimination plaintiff.[67] In *Hardin v. Hussmann Corp*.,[68] for example, the Eighth Circuit determined that non-contemporaneous statements, along with other evidence (supervisor's reliance on incomplete research and failure to consider other employees for termination), fulfilled the "additional showing" requirement of a prima facie age discrimination case. According to the Eighth Circuit:

> non-contemporaneous statements of other employees, even if not the employees who ultimately made the decision as to the adverse employment action, are not irrelevant to the "additional showing" inquiry merely because the plaintiff has failed to demonstrate a direct causal relationship between the statements and the adverse employment action."[69]

Based on the federal case law cited above, the Administrative Law Judge finds that Complainants' "common evidence" of non-contemporaneous statements and statements by non-decisionmakers is relevant and, when coupled with Complainants' other evidence, is sufficient to meet the "additional evidence" requirement of a prima facie disparate treatment case. Accordingly, the Administrative Law Judge concludes that both Chang and Anderson have established prima facie cases. Both Complainants are members of a protected age group; both were well qualified for their positions; both were discharged; and both have submitted sufficient "additional evidence" that age was a factor in their terminations.

Nondiscriminatory Business Justification

Once the complainant has met his initial burden of establishing a prima facie case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[70] Here, Alliant contends that it laid off Complainants because they were the lowest ranked employees in a comparative ranking process and that such layoffs were necessary due to difficult economic circumstances at the time.

Under the burden shifting analysis of *McDonnell Douglas,* an employer has only a burden of production to articulate a legitimate, non-discriminatory reason for Complainants' layoffs once a prima facie case has been made.[71] The Administrative Law Judge finds that Alliant has met its burden by articulating legitimate, nondiscriminatory reasons for its layoff decisions.

Pretext

If the employer carries its burden of production by articulating some legitimate, nondiscriminatory reason for the adverse employment action, the presumption of discrimination raised by the prima facie case is rebutted and "drops from the case."[72] The burden then shifts back at the third and final stage to the plaintiff to show that the

employer's proffered reason was merely a pretext for discrimination.[73] The plaintiff maintains at all times the ultimate burden of persuading the trier of fact that the adverse employment action was motivated by intentional discrimination.[74]

In *Rothmeier v. Investment Advisers, Inc.*,[75] the Eighth Circuit held that a plaintiff alleging age discrimination can avoid summary judgment only:

> if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision. The second part of the test sometimes may be satisfied without additional evidence where the overall strength of the prima facie case and the evidence of pretext "suffice[s] to show intentional discrimination." The focus, however, always remains on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff because of the plaintiff's age.

Additionally, in *Ryther*[76], the Eighth Circuit emphasized that "evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination. . . . The plaintiff must still persuade the [fact-finder] . . . that the employment decision was based upon intentional discrimination."[77]

Although the "common evidence" submitted by Complainants (e.g., Warson comment, Schwartz Memo, White Paper, internal Human Resources' studies) is sufficient to establish the "additional evidence" requirement for a prima facie case, it is not sufficient to establish the ultimate issue of pretext. The Eighth Circuit has held that some causal relationship is necessary to demonstrate the significance of non-contemporaneous statements or statements made by non-decisionmakers to the resolution of the ultimate issue of intentional discrimination.[78] That is, there must be a sufficient causal relationship between the statements and the actual decision to terminate the particular employee, in order to support a finding of pretext for intentional age discrimination. Complainants' common evidence of non-contemporaneous statements and statements made by non-decisionmakers lacks the required causal relationship to the specific decisional processes that lead to their terminations.[79]

Yet, in addition to their common evidence, Chang and Anderson have offered other evidence that Alliant's proffered reasons for their terminations were pretextual and that age was a determinative factor in their discharge. First, Complainants have submitted statistical evidence, compiled and analyzed by Dr. David Peterson of PRI Associates, demonstrating that between 1990 and 1995 older employees at Alliant were laid off in disproportionately large numbers.[80] Dr. Peterson's studies reveal that layoffs of employees over the age of 40 resulted in disparities ranging from -4.40 to -11.12 standard deviations from parity.[81] In his studies, Dr. Peterson analyzed employee data first by time period, department name, and job family, then by time period, department name, and department identification number, and finally by time period, facility, grade, department identification number, and job family.[82] Within each such group, Dr. Peterson compared the number of people over forty terminated against the perfect parity number for that group.

And, Dr. Peterson specifically studied the departments and job families from which Chang and Anderson were terminated. According to Dr. Peterson's analyses, the Engineer job family showed a disparity of – 3.24 standard deviations at the time of Chang's

layoff. And the overall number of standard deviations associated with layoffs in Tank Ammunitions was – 3.08.[83] With respect to David Anderson, Dr. Peterson found the Materials & Manufacturing Department had a disparity of – 4.17 standard deviations and the job family AD had a disparity of – 3.15 during the time period Anderson was laid off.[84] Dr. Peterson further maintains, despite Alliant's claims to the contrary, that his analyses compared similarly situated employees.[85] According to Dr. Peterson, all of his statistical comparisons show a consistent and pervasive pattern of layoffs adverse to older employees.[86]

Unlike the plaintiff in *McCashin v. Alliant Techsystems, Inc.*[87], who submitted only company-wide statistics, the plaintiff in *Mathena v. Alliant Techsystems, Inc.*[88], who presented no statistical evidence at all, and the plaintiff in *Dexter v. Alliant Techsystems, Inc.*[89], who failed to show an unfavorable statistical disparity within her department, the Complainants in this matter have submitted statistical analyses comparing employees by department and job family. And Complainants have further submitted analyses demonstrating unfavorable statistical disparities within their specific departments and job families.[90] While the Eighth Circuit minimizes the importance of company-wide statistics in determining the discriminatory animus of a specific manager who made the ultimate decision to terminate,[91] the court has held that statistical evidence relating to employees in the department where a terminated plaintiff formerly worked may support a finding of pretext.[92] The Administrative Law Judge finds that Complainants' statistical evidence is sufficiently probative of pretext.

Complainants further submit that the changes in the ranking criteria between 1990 and 1995 had a detrimental impact on older employees. Specifically, "seniority" was no longer considered a "critical" positive factor but was relegated to a mere tiebreaker along with diversity and long-term service.[93] And, Complainants maintain that the "snapshot approach" of performance evaluations, where supervisors only looked at an employee's performance since his or her last review, hurt older employees. This is particularly true when the managers conducting the evaluations were newly assigned and knew little of the employee they were reviewing. Moreover, Complainants contend that other ranking criteria such as "flexibility" and "promotability" were particularly susceptible to age stereotyping and may have negatively influenced managers in ranking older workers.[94]

Finally, Complainants dispute the validity of their rankings and maintain that their sudden low scores after years of positive or exceptional performance reviews raises an inference of age discrimination. Unlike the plaintiff in *Dupay v. Alliant Techsystems, Inc.*[95], who was consistently ranked at or near the bottom among engineers in his department, and the plaintiff in *Mathena*[96], who offered no evidence to contradict the validity of his low ranking, Complainants have demonstrated that they were consistently ranked above average or at the top of their departments just prior to the low rankings which lead to their layoffs. Moreover, Complainants point out that the managers who evaluated them were newly assigned, knew little of their work performances, and made no efforts to acquire information from former supervisors, customers, or others. And, when questioned in depositions, Complainants' supervisors were unable to identify specific examples of performance problems that lead to Complainants' low rankings.[97] Complainants argue that the rankings are only as valid as the information used to create them, and that the process can be easily manipulated to mask discrimination.

Evidence of generally positive performance reviews has been found to be "particularly unpersuasive" in RIF cases, as even capable employees are let go when in employer is down-sizing.[98] Yet, in reviewing RIF cases, courts have looked at an employer's

method of determining which employees to discharge for evidence of possible discriminatory intent.[99] And an employer's reliance on incomplete research with respect to an employee's performance or a recent negative assessment of an employee that is in conflict with prior past performance reviews may raise questions as to the believability of the employer's stated reasons for the discharge and may be evidence of pretext.[100]

Viewing all the evidence in the light most favorable to Complainants, the Administrative Law Judge concludes that Complainants have put forth sufficient evidence to create a fact issue as to whether Alliant's proffered reasons for their terminations were pretextual. Specifically, Complainants' statistical evidence of a disparate age impact, the evidence regarding the ranking process (changes in ranking criteria, new managers, lack of input from former supervisors, clients or others), and Complainants' swift drop in ranking is sufficient to create a question of fact as to pretext. And this evidence, coupled with Complainants' "common evidence" of statements and documents suggesting an age-based animus at Alliant, is sufficient support a reasonable inference that Complainants' age was a determinative factor in Alliant's decision to terminate them. Because there are genuine issues of material fact as to whether Alliant discriminated against Chang and Anderson due to their age and used the RIF as a pretext for age discrimination, Alliant's motion for summary disposition on Complainants' disparate treatment claims is denied.

II. Disparate Impact

Disparate impact claims challenge employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.[101] Complainants bear the burden of proof of establishing a prima facie case of disparate impact by "isolating the specific employment practices that are allegedly responsible for any observed statistical disparities."[102] A disparate impact plaintiff need not prove discriminatory intent.[103] Instead, the plaintiff must demonstrate that a "facially neutral employment practice actually operates to exclude from a job a disproportionate number of members of the protected class."[104] Underlying this theory of liability is the premise "that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[105] The plaintiff must meet its burden by showing that an employment practice is responsible for a statistically significant adverse impact on a protected class.[106] An employer may attempt to rebut the prima facie case by presenting "contrary interpretations of the plaintiff's statistical data or introduce its own data that casts doubt on the original inference of illegal discrimination."[107]

In order to establish a prima facie case of disparate impact, the plaintiff must: (1) identify the specific employment practices being challenged; (2) show disparate impact on the basis of age; and (3) prove causation by introducing statistical evidence of a kind and degree sufficient to show that the practice in question has caused the adverse action because of plaintiff's membership in a protected group.[108] Complainants are required to isolate the challenged employment practice from the myriad of innocent factors and specifically show that the challenged practice caused a significantly disparate impact on older workers.[109] If a prima facie case of disparate impact is made, the employer must justify its practice by showing that it is "manifestly related to the job or significantly furthers an important business purpose."[110] If the employer makes such a showing, the Complainants must show that other practices or policies exist that "would cause a significantly lesser adverse impact on the

identified protected class."[111] Complainants have identified both the ranking process and the RIFs as a whole as the specific neutral employment practices responsible for causing the alleged disparate impact on older employees at Alliant.

Ranking Process

Disparate impact analysis may be applied to subjective or discretionary employment practices such as the ranking system employed by Alliant to evaluate employees selected as candidates for dismissal.[112] In *McCashin v. Alliant Techsystems*[113], Judge Michael Davis held that the plaintiff in that case had identified the facially neutral ranking system adopted by Alliant to implement its RIFs as a specific employment practice allegedly responsible for observed statistical disparities in the termination of employees.[114] Yet, any argument that the ranking criteria were applied in an unfair or discriminatory manner is insufficient to support a disparate impact claim. Rather, such an allegation supports only a claim of disparate treatment as it concerns intentional discrimination and not the application of a facially neutral policy.[115]

In the instant matter, Complainants argue that they have established that Alliant's ranking process, applied as written, had a disparate impact on older employees. Specifically, Complainants claim that the changes in the ranking criteria used by Alliant to identify employees for layoff adversely affected older workers. Complainants contend that in 1990 Alliant reduced "seniority" from a critical ranking factor to merely a tiebreaker when necessary.[116] Likewise, "long-service" or "credited service" was used only if needed as a tiebreaker.[117] And Complainants contend that in 1994, Alliant eliminated the requirement that executive approval be obtained before terminating long-service employees.[118] According to Complainants, these changes in the ranking criteria and the "snap shot" approach to performance reviews had a disparate impact on older workers.[119]

Alliant contends that both Complainants have testified that the procedures used to rank employees were fair but that their managers applied the criteria in an unfair manner in order to get rid of older employees.[120] For example, when asked at his deposition if he was alleging that there was a policy or procedure at Alliant that had an adverse impact on older workers, David Anderson responded: "I probably wouldn't say that there was a policy, no. . . . I believe there was an intent to lower the average age of the working force."[121] And later, Mr. Anderson indicated that there was nothing inherently discriminatory about the criteria used by Alliant to evaluate employees, provided that the evaluation was done fairly.[122] Likewise, apart from expressing concern regarding the fairness of applying general criteria to individual employees with different job duties, Mr. Chang did not indicate that the criteria themselves were discriminatory.[123] And, while Complainants' expert Dr. Ben Rosen concludes in his report that negative age stereotypes may have influenced managers to rank older employees lower than could be supported objectively, he does not suggest that the ranking criteria themselves were discriminatory.[124] Rather, Dr. Rosen opines that the age biases of the managers applying the criteria may have resulted in lower ranking scores for older workers.[125] Accordingly, Alliant maintains that Complainants are not arguing disparate impact at all – they are merely rehashing their disparate treatment claim.

In addition, Alliant argues that Complainants have failed to establish causation with respect to the ranking criteria. When asked in his deposition if he could identify whether any of the ranking factors had a disparate impact on older workers, Complainants' expert Dr.

Peterson responded: "I have no opinion on whether they might or might not."[126] Dr. Peterson also stated that he has no opinion on whether older employees are inherently disadvantaged by Alliant's ranking factors, that he did not study the ranking factors, and that he lacks the expertise to give an opinion as to whether the factors are inherently biased against older employees.[127] Moreover, Alliant argues that Complainants have failed to explain how the ranking factors, if honestly applied, were unfair to older workers. According to Alliant, there is no reason why older employees should not be as able as younger employees to demonstrate such criteria as good recent performance, job skills, work conduct and leadership behaviors.

Complainants maintain that the EEOC's and Dr. Peterson's statistical analyses of the 1990-1995 layoffs establish that the ranking process caused the age disparities in the termination of Alliant employees. The EEOC looked at 6-month intervals between 1990-1995 and compared the number of active employees 40 years and older, with the number of active employees 40 years and younger. The EEOC's analysis showed that in five of ten time periods, older employees were laid off in disproportionately large numbers.[128] The EEOC's analysis resulted in an overall standard deviation of -6.37.[129] Complainants' expert, Dr. Peterson, refined the EEOC's layoff analysis by grouping employees based on their departmental affiliation and job family and found that the lay off of employees over 40 resulted in a disparity of -8.9 standard deviations.[130] Further refinements looking at six-month periods in specific departments and job families also resulted in standard deviations of over 2.[131] Complainants argue that Dr. Peterson's statistical analyses establish a pervasive pattern at Alliant of laying off older employees sufficient to support a prima facie case of disparate impact.[132] Complainants also insist, contrary to Alliant's assertion, that Dr. Peterson did take into consideration other factors that could affect a lay off decision, such as job skills and performance.

Alliant argues that Complainants have not isolated the ranking criteria from the myriad of other innocent factors as the cause of the bottom-line disparities reflected in Dr. Peterson's studies. Alliant's expert analyzed the same data and found that, when the results are separated by job family or department but still aggregated against the entire time period, there are job families or departments that did not have statistically significant differences.[133] In addition, Alliant's expert conducted a "logistic regression analysis" of the involuntary layoffs by six-month snapshots that controlled for organizational variables and factors such as: (1) the proportion of employees in each job family laid off; (2) whether employee was terminated or requested voluntary layoff; (3) percent salary change for each employee as a measure of performance and the effects on budgets; (4) education level; (5) time since engineering degree; (6) facility; (7) credited service; and (8) employees over 40.[134] Based on the results, Alliant's expert concluded that the effect of age on the layoffs was generally not statistically significant.[135] According to Alliant, the findings of its expert and the fact that both Complainants survived earlier layoffs under different ranking systems are inconsistent with Complainants' claims that the ranking process caused a disparate impact based on age.

In addition, Alliant contends that even if it were determined that Complainants have established a prima facie case, the ranking process was manifestly related to the job and significantly furthered the important business purpose of cost reduction. And, Alliant argues that Complainants have not identified alternative practices that would "cause a significantly lesser adverse impact" on workers age 40 and older.[136] In response, Complainants contend that there were a "myriad of less discriminating alternatives" available to Alliant to reduce costs if such reductions were necessary.[137] According to Complainants, Alliant could

have used the same age-positive ranking criteria for selecting employees for layoffs that had been used by Honeywell – namely, crediting seniority, diversity and long-term service. And, Alliant could have looked at longer time frames when evaluating an employee's performance. Complainants further suggest that Alliant could have employed the cost savings alternatives suggested in the "White Paper" document such as: across the board salary reductions, elimination of overtime, salary freezes, retirement buyouts, and offering extended leaves with benefits.[138]

The Administrative Law Judge finds that Complainants have failed to establish that Alliant's ranking process was responsible for a statistically significant adverse impact on older workers. In *Watson v. Fort Worth Bank & Trust*[139], Justice O'Connor explained the causation requirement as follows:

> "[W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."

Although Complainants' expert, Dr. Peterson, has put forth statistical analyses demonstrating age disparities in the layoffs at Alliant, he has specifically testified that he has no opinion on whether the ranking factors caused a disparate impact on older workers. And Complainants have not sufficiently demonstrated how the criteria, if honestly applied, disadvantaged older workers.[140] That is, apart from not getting credit for seniority or long-term service, Complainants have not shown that older workers were ranked lower on other criteria (e.g., demonstrated job skills, leadership behaviors) simply because of their age. Instead, both Complainants and their experts focused their deposition testimony on the alleged unfair applications of the ranking criteria by Alliant managers.[141] Consequently, the Administrative Law Judge concludes that Complainants have failed to demonstrate the causal connection between the statistical disparities and the challenged ranking criteria.

Yet, even if Complainants' statistical disparity evidence was enough to establish a prima facie case of disparate impact based on the ranking factors, the Administrative Law Judge finds that Alliant has met its burden of demonstrating that the ranking process was manifestly job-related and significantly furthered the important business purpose of reducing costs in the face of declining revenues.[142] Accordingly, the burden shifts back to Complainants to demonstrate the existence of a "comparably effective practice that the court finds would cause a significantly lesser adverse impact on the identified protected class."[143] At this juncture, the Complainants have the opportunity to persuade the finder of fact that alternative practices would have equally satisfied the employer's interest without creating a disparate impact. In determining whether the proffered alternatives are equally effective, the fact finder may consider factors such as efficiency, cost or other burdens associated with the alternative.[144]

The Administrative Law Judge finds that Complainants have failed to put forth sufficient evidence of a comparably effective practice that would cause a significantly

lesser adverse impact on older workers. There is simply no evidence in the record, beyond mere conjecture, that an alternative layoff ranking process or some other cost reduction strategy, such as salary freezes or elimination of overtime, would have been as effective at cutting costs with less adverse impact on older workers. Complainants' expert, Dr. Peterson, has testified that he has no opinion on whether any of Alliant's ranking factors had a disparate impact on older workers.[145] Likewise, Dr. Peterson has not opined that alternative ranking factors would have had significantly less adverse impact on older workers. And, while Complainants' other expert, Dr. Ben Rosen, states in his report that several of the ranking criteria used by Alliant were "particularly susceptible of age stereotyping" (e.g., "flexibility" and "leadership"), he does not give an opinion as to alternative ranking criteria that would have had a significantly less adverse age impact.[146] Mr. Chang, himself, testified at his deposition that any ranking criteria, other than absenteeism, is potentially discriminatory if applied generally to all employees.[147] Consequently, Complainants have failed to offer any proof that changes to the ranking factors, such as crediting seniority, would have caused different age patterns in the layoffs.

Finally, Complainants have offered no evidence that the alternative strategies they suggested (e.g. salary freezes, elimination of overtime) would have been as effective in reducing Alliant's costs with significantly less adverse age impact. Rather, Complainants have merely cited to the one-page list of cost reduction ideas contained in Alliant's "White Paper".[148] The ideas listed are not developed and the White Paper contains no analysis regarding their feasibility or effectiveness.[149] Absent such evidence, the Administrative Law Judge concludes that Complainants have failed to meet their burden, under Minn. Stat. § 363.03, subd. 11, of demonstrating that a comparably effective practice existed that would have caused a significantly lesser adverse impact on older workers.[150]

Reductions in Force (RIFs)

Complainants have also identified the RIFs themselves as specific employment practices that had a disparate adverse impact on older employees. Alliant argues that the RIFs as a whole are too broad to constitute specific employment practices. In *Leidig v. Honeywell*[151], the court suggested that RIFs are too broad to be considered a specific practice for purposes of a disparate impact claim. The court noted in a footnote that the plaintiff's claim that the whole RIF had a disparate impact on older employees "does not appear to identify a 'specific employment practice' as required by the Supreme Court's holding in *Wards Cove*…".[152]

Furthermore in the recent decision of *Dexter v. Alliant Techsystems, Inc*.[153], Chief Judge Magnuson found that a RIF as a whole cannot constitute a specific employment practice for purposes of a disparate impact claim. According to Judge Magnuson:

> Allowing [plaintiff] to proceed on such a basis would effectively negate the entire first prong of the disparate impact test. Instead, so long as a statistical disparity existed, no matter how small, all employers would automatically be subject to discrimination claims.[154]

Moreover, in *Lowe v. Commack Union Free School District*[155], the Second Circuit held that the plaintiffs, unsuccessful teacher applicants, could not satisfy the requirements of a prima facie disparate impact case simply by broadly attacking as discriminatory the hiring process as a whole. Citing to *Wards Cove*[156], the court found the plaintiffs "unable to meet

their burden of isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."[157]

In accordance with the holdings above, the Administrative Law Judge finds that Alliant's RIFs as a whole are too broad to be the identified specific employment practice for purposes of a prima facie disparate impact case. Like the "hiring process" identified in *Lowe,* Alliant's "firing processes" are too broad to be considered specific employment practices for purposes of a prima facie disparate impact case. The Administrative Law Judge concludes that Complainants have failed to establish a prima facie case of disparate impact based on either the ranking factors or Alliant's RIFs. Accordingly, Complainants' disparate impact claims fail as a matter of law. Alliant's motion for summary disposition on Complainants' disparate impact claims is granted. Complainant Chang's motion for summary disposition on the same claim is denied.

P.A.R.

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[1] Minn. Stat. § 363.03, subd. 1(2)(b) (1996) (providing that it is an unfair employment practice for an employer to discharge an employee because of age).
[2] Anderson Aff., Ex. A at 2-8.
[3] Terry Aff., Tab 15 at 2.
[4] Anderson Aff., Ex. A at 16; Terry Aff., Tab 2, Warson Depo. Ex. 5; Chang Memo in Support of Partial Summary Judgment, Exs. 8-15.
[5] Terry Aff., Tab 53, Schiestl Depo. at 262.
[6] Anderson Aff. Ex. A at 18 and Ex. HH at 18-19.
[7] Id. at 15-18, 21.
[8] Anderson Aff., Ex. HH, Appendix B.
[9] Id.
[10] Id.
[11] Id. (Chang tied for third place with Ray Hamblin, a 56 year old EN24 grade engineer.)
[12] Schiestl Aff., Ex. 10.
[13] Id.
[14] Terry Aff., Tab 50, Noon Depo. at 26, 85-88, 99-108; Tab 53, Schiestl Depo. at 252, 267-268; Tab 100 (Interrogatory No. 7).
[15] Terry Aff., Tab 53, Schiestl Depo. at 267-268.
[16] Terry Aff., Tab 50, Noon Depo. at 95, 141; Tab 53, Schiestl Depo. at 262-64, 291.
[17] Anderson Aff., Ex. MM, Chang Depo. at 447-450; Terry Aff., Tab 53, Schiestl Depo. at 259-260.
[18] Horton Aff., Ex. 8.
[19] Anderson Aff., Ex. A, Appendix B. (Anderson received 18 points out of a total of 25).
[20] Id.
[21] Id. (Anderson and two other employees had the third highest total points. Two employees had the highest total points, and four employees tied for the second highest total points.)
[22] Id.
[23] Anderson Aff., Ex. KK, Biersdorf Depo. at 40-41, 45.
[24] Horton Aff., Biersdorf Depo. at 46-48, 60, 71-72; Dornfield Depo. at 30-32.
[25] Horton Aff., Ex. 4 (2-94 performance evaluation); Ex. 5 (Peer/Customer Feedback Survey).
[26] D. Anderson Aff. at ¶¶ 15, 16; Anderson Aff., Ex. JJ, D. Anderson Depo. at 76-77;
[27] Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1995); Louwgie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.
[28] See, Minn. Rules 1400.6600 (1998).
[29] Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984).

[30] Thiele v. Stitch, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986).
[31] White v. Minnesota Dept. of Natural Resources, 567 N.W.2d 724 (Minn. App. 1997).
[32] *Id*.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988).

[33] *Carlisle*, 437 N.W.2d at 715, *quoting* Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).
[34] Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984).
[35] *See, e.g.,* Celotex, 477 U.S. at 325; Thompson v. Campbell, 845 F.Supp. 665, 672 (D.Minn. 1994); Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971).
[36] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986).
[37] Haglof v. Northwest Rehabilitation, Inc., 910 F.2d 492, 495 (8th Cir. 1990); Hillebrand v. M-Tron Indus., Inc., 827 F.2d 363, 364 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004, 109 S.Ct. 782, 102 L.Ed.2d 774 (1988).
[38] Id.
[39] Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 710 n.4 (Minn. 1992).
[40] Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 449 (8th Cir. 1993), *quoting* Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992).
[41] Walton v. McDonnell Douglas Corp., 167 F.3d 423, 426 (8th Cir. 1999).
[42] *Id*., *citing* Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir. 1991), *quoting* Price Waterhouse v. Hopkins, 490 U.S. 227, 277, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); Diez v. Minnesota Min. & Mfg., 564 N.W.2d 575, 579 (Minn. App. 1997), *rev. denied* (Minn. Aug. 21, 1997).
[43] Terry Aff., Tab 11, Mockenhaupt Depo. at 71-72.
[44] Terry Aff., Tab 17, Schwartz Depo., Ex. 11.
[45] Terry Aff., Tab 37, Bauman Depo., Ex. 7.
[46] Terry Aff., Tab 16, Buck Depo., Ex. 24.
[47] Terry Aff., Tab 1, Moore Depo., Exs. 8, 9, 15-18, 31.
[48] Terry Aff., Tab 70, Iverson Aff. ¶ 1.
[49] Terry Aff., Tab 70, Iverson Aff. ¶ 4.
[50] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Feges, 483 N.W.2d at 710. Complainants incorrectly argue that a "mixed-motive burden shifting" analysis should apply to their claims. Minnesota law does not distinguish between "single motive" and "mixed motive" cases, and both are analyzed under McDonnell Douglas. *See*, Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 626-27 (Minn. 1988).
[51] Bashara v. Black Hills Corporation, 26 F.3d 820, 823 (8th Cir. 1994); Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1165-66 (8th Cir. 1985); Dietrich v. Canadian Pacific Ltd., 536 N.W.2d 319, 323-24 (Minn. 1995).
[52] Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 776-77 (8th Cir. 1995).
[53] Id. at 777.
[54] Chang Opp. Memo at 100.
[55] Id. at 9 (citing Mockenhaupt Affidavit).
[56] Terry Aff., Tab 49, Mockenhaupt Aff. at ¶ 4.
[57] Id. at ¶ 1.
[58] Id.
[59] Id. at ¶¶ 4, 5.
[60] Anderson Aff., Ex. A, ERS Report at 7-8.
[61] Id.
[62] Hirsch Aff., Exs. 1-5.
[63] 536 N.W.2d 319, 324 (Minn. 1995).
[64] Id. quoting, Barnes v. GenCorp, Inc., 896 F.2d 1457, 1465 (6th Cir.), *cert. denied*, 498 U.S. 878, 111 S.Ct. 211, 112 L.Ed. 171 (1990).
[65] Dietrich, 536 N.W.2d at 324.
[66] Id.; Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790, 801 (Minn. 1995); Fahey v. Avnet, Inc., 525 N.W.2d 568, 572 (Minn. App. 1995).
[67] Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 778-79 (8th Cir. 1995); Elliott v. Montgomery Ward & Co., 967 F.2d 1258, 1262 (8th Cir. 1992).

[68] 45 F.3d 262, 266 (8th Cir. 1995).
[69] Hutson, 63 F.3d at 778.
[70] Id. at 776-777.
[71] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).
[72] Rothmeier v. Investment Advisors, Inc., 85 F.3d 1328, 1332, 1338 (8th Cir. 1996).
[73] Id. at 1332.
[74] Id.
[75] 85 F.3d at 1336-37.
[76] 108 F.3d 832 (8th Cir. 1997).
[77] 108 F.3d at 837-38.
[78] Hutson, 63 F.3d at 779.
[79] Id.; *See also*, Walton v. McDonnell Douglas Corp., 167 F.3d 423, 428 (8th Cir. 1999).
[80] Terry Aff., Tab 5, PRI Report.
[81] Terry Aff., Tab 5, PRI Report at 4-5.
[82] Terry Aff., Tab 6, Peterson Reply at 7.
[83] Terry Aff., Tab 6, Peterson Reply at 4.
[84] Horton Aff., Ex. 9 at 3.
[85] Chang's Reply Memo, Ex. B, Second Aff. of Peterson at ¶¶ 6, 7.
[86] Terry Aff., Tab 5, PRI Report at 3; Chang's Reply Memo, Ex. B, Peterson Second Aff. ¶ 4.
[87] Civil File No. 3-96-589, slip op. at 9, 14-15 (D.Minn. March 1, 1999).
[88] Civil File No. 4-95-28, slip op. at 7 (D.Minn. March 19, 1996).
[89] Civil File No. 97-580, slip. op. at 10-11 (D.Minn. June 22, 1999).
[90] Terry Aff., Tab 6, Peterson Reply at 4; Horton Aff., Ex. 9 at 3-4.
[91] Hutson, 63 F.3d at 778.
[92] Id.; MacDissi v. Valmont Industries, Inc., 856 F.2d 1054, 1058 (8th Cir. 1988).
[93] Terry Aff., Tab 15; Anderson Aff., Ex. A at 16: Chang Motion for Partial Summary Judgment, Exs. 8-15.
[94] Terry Aff., Tab 19, Rosen Report at 10.
[95] Civil File No. 97-728, slip op. at 3 (D.Minn. May 24, 1999).
[96] Civil File No. 4-95-28, slip op. at 9 (D.Minn. March 19, 1996).
[97] Terry Aff., Tab 50, Noon Depo. at 85-88, 99-108 and Tab 53, Schiestl Depo. at 252, 267-268; Horton Aff., Biersdorf Depo. at 46-48, 60, 71-72; Dornfield Depo. at 30-32.
[98] Hutson, 63 F.3d at 779.
[99] Hardin, 45 F.3d at 266; Bashara v. Black Hills Corp., 26 F. 3d 820, 825 (8th Cir. 1994); Hillebrand v. M-Tron Indus., Inc., 827 F.2d 363, 367-68 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004, 109 S.Ct. 782, 102 L.Ed.2d 774 (1988).
[100] Hutson, 63 F.3d at 780; Hardin, 45 F.3d at 266; Fast v. Southern Union Company, 149 F.3d 885, 891 (8th Cir. 1998).
[101] International Bhd of Teamsters v. United States, 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 1854-55 n. 15, 52 L.Ed.2d 396 (1977); Kohn v. City of Minneapolis Fire Dept., 583 N.W.2d 7, 12 (Minn. App. 1998), *rev. denied* (Minn. Oct. 20, 1998).
[102] Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994, 108 S.Ct. 2777, 2788, 101 L.Ed.2d 827 (1988).
[103] Sigurdson v. Carl Bolander & Sons, Co., 532 N.W.2d 225, 229 (Minn. 1995).
[104] Schlemmer v. Farmers Union Cent. Exch., Inc., 397 N.W.2d 903, 908 (Minn. App. 1986).
[105] Leidig v. Honeywell, Inc., 850 F.Supp. 796, 801 (D.Minn. 1994) (quoting, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987, 108 S.Ct. 2777, 2785, 101 L.Ed.2d 827 (1988)).
[106] Minn. Stat. § 363.03, subd. 11: Kohn, 583 N.W.2d at 13.
[107] Kohn, 583 N.W.2d at 12 (citing, Schlemmer, 397 N.W.2d at 908 (holding claim not substantiated by evidence where evidence showed only rate at which older employees were hired, not percentage of fired employees who were older.))
[108] *See*, Watson, 487 U.S. at 994.
[109] Wards Cove, 490 U.S. at 657.
[110] Minn. Stat. § 363.03, subd. 11.
[111] Id.

[112] Watson, 487 U.S. at 994; Leidig, 850 F. Supp. at 802-03 (disparate impact analysis applied to Honeywell's use of "flexibility" as a criterion in reduction in force); Schlemmer, 397 N.W.2d at 908-09.
[113] Civil File No. 3-96-589 (D.Minn. March 1, 1999).
[114] Id. at 17.
[115] Dexter v. Alliant Techsystems, Inc., Civil File No. 97-580 at 10 (D.Minn. June 22, 1999). See, Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2nd Cir. 1992); Hunt v. Tektronix, Inc., 952 F.Supp. 998, 1009 (W.D.N.Y. 1997).
[116] Anderson Aff., Ex. A at 16; Terry Aff., Tab 2, Warson Depo. Exs. 4 and 5; Chang Memo in Support of Partial Summary Judgment, Exs. 8-15.
[117] Id.
[118] Chang Memo in Support of Partial Summary Judgment, Exs. 14 and 15.
[119] Chang's Memo in Support of Partial Summary Judgment at 16-18, 23.
[120] Anderson Aff., Ex. MM, Chang Depo. at 486-505; Ex. JJ, Anderson Depo. at 313-16.
[121] Anderson Aff., Ex. JJ, Anderson Depo. at 278.
[122] Id. at 313-14.
[123] Anderson Aff., Ex. MM, Chang Depo. at 486-505.
[124] Terry Aff., Tab 19, Rosen Report at 10.
[125] Id.
[126] Anderson Aff., Ex. DD, Peterson Depo. at 308.
[127] Second Anderson Aff., Ex. 3, Peterson Depo. at 303-10.
[128] Chang's Motion for Partial Summary Disposition, Exs. 2-3.
[129] Id., Ex. 2 at 2.
[130] Id., Ex. 2 at 2-3.
[131] Id.
[132] See, Graffam v. Scott Paper Co., 870 F.Supp. 389, 399 (D.Maine 1994) (substantial statistical disparity sufficient to establish prima facie case of disparate impact).
[133] Anderson Aff., Ex. HH, Chang ERS Report at 49.
[134] Id. at 46-48.
[135] Id. at 49-50; Haworth Aff. at ¶ 18.
[136] Minn. Stat. § 363.03, subd. 11.
[137] Chang's Reply Memo at 48-49.
[138] Terry Aff., Tab 37, Bauman Depo., Ex. 7 at 4.
[139] 487 U.S. at 994, 108 S.Ct. 2788-2789.
[140] *See, e.g.*, Renaldi v. Manufacturers & Traders Trust Co., 954 F.Supp. 614, 620 (W.D.N.Y. 1997).
[141] Anderson Aff., Ex. JJ, Anderson Depo. at 313-14; Anderson Aff., Ex. MM, Chang Depo. at 486-505; Anderson Aff., Ex. DD, Peterson Depo. at 185, 258; Second Anderson Aff., Ex. 3, Peterson Depo. at 257, 307-10; Terry Aff., Tab 19, Rosen Report at 8-11.
[142] *See*, Schlemmer, 397 N.W.2d at 908 (cost reduction found to be legitimate, nondiscriminatory reason for employment action); Callister v. Carlson Marketing Group, Inc., 1996 WL 16255, *2 (unpublished) (Minn. App. 1996) (need for cost reduction satisfied "important business purpose").
[143] Minn. Stat. § 363.03, subd. 11.
[144] Wards Cove, 490 U.S. at 661, 109 S.Ct. at 2127 (quoting Watson, 487 U.S. at 998, 108 S.Ct. at 2790).
[145] Anderson Aff., Ex. DD, Peterson Depo. at 308.
[146] Chang's Memo in Support of Partial Summary Disposition, Ex. 17.
[147] Anderson Aff., Ex. MM, Chang Depo. at 491-505.
[148] Chang's Memo in Support of Partial Summary Judgment at 33-34; Chang's Reply Memo in Support of Partial Summary Judgment at 48; Terry Aff., Tab 37, Bauman Depo., Ex. 7.
[149] Terry Aff., Tab 37, Bauman Depo., Ex. 7. See, Dupay v. Alliant Techsystems, Inc., Civil File No. 97-728, slip op. at 15-16 (D.Minn. May 24, 1999).
[150] Id. See also, Callister v. Carlson Marketing Group, Inc., 1996 WL 162555 (unpublished) (Minn. App. 1996) (Expert accountant's testimony insufficient to support Complainant's burden of demonstrating a comparably effective practice where expert acknowledged he was unaware of how alternative cost reduction measures would affect older workers.)
[151] 850 F.Supp. 796, 802 n. 6 (D.Minn. 1994).
[152] Id.

[153] Civil File No. 97-580, slip op. at 8 (D.Minn. June 22, 1999).
[154] Id.
[155] 886 F.2d 1364, 1370-71 (2nd Cir. 1989).
[156] 490 U.S. at 656, 109 S.Ct. at 2124.
[157] Lowe, 886 F.2d at 1370.